

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

NO. 75-4018

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MARTIN A. GLEASON, INC. and
GUTTERMAN FUNERAL HOME, INC.,

Respondents.

PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING IN BANC, ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

ROBERT A. GIANNASI,
Assistant General Counsel,
JANET C. McCAA,

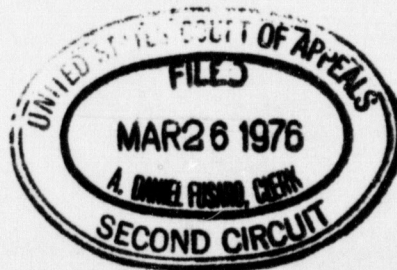
Attorney,

National Labor Relations Board,
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.



3

(i)

INDEX

AUTHORITIES CITED

<u>Cases:</u>	<u>Page</u>
Bayliner Marine Corp., 215 NLRB No. 11 (1974), 87 LRRM 1450	2
Elastic Stop Nut Corp. v. N.L.R.B., 142 F.2d 371 (C.A. 8, 1944), cert. den., 323 U.S. 722	4
N.L.R.B. v. General Stencils, Inc., 438 F.2d 894 (C.A. 2, 1971)	3, 4, 5
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969)	4
N.L.R.B. v. Illinois Tool Works, 153 F.2d 811 (C.A. 7, 1946)	4
N.L.R.B. v. Syracuse Color Press, Inc., 209 F.2d 596 (C.A. 2, 1954), cert. den., 347 U.S. 966	4
N.L.R.B. v. Winn-Dixie Stores, 341 F.2d 750 (C.A. 6, 1965), cert. den., 382 U.S. 839	2, 5
Raser Tanning Co. v. N.L.R.B., 276 F.2d 80 (C.A. 6, 1960), cert. den., 363 U.S. 830	6
Retail Clerks Int'l Ass'n v. N.L.R.B., 373 F.2d 655 (C.A. D.C., 1967)	2, 6
Robertshaw Controls Co., Lux Time Div. v. N.L.R.B., 483 F.2d 762 (C.A. 4, 1973)	6, 7, 8
Siegel, Henry I., Co v. N.L.R.B., 328 F.2d 25 (C.A. 2, 1964)	3
Surprenant Mfg. Co. v. N.L.R.B., 341 F.2d 756 (C.A. 6, 1965)	4, 5, 6

(ii)

Page

Texas Industries v. N.L.R.B., 336 F.2d 128 (C.A. 5, 1964)	2, 5
Winn-Dixie Stores, Inc., 143 NLRB 848 (1964)	3

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>)	
Section 8(a)(1)	2, 4

Miscellaneous:

N.L.R.B. Rules and Regulations, Series 8, as amended (29 C.F.R.), Section 102.118(b)	6
---	---

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 75-4018

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MARTIN A. GLEASON, INC. and
GUTTERMAN FUNERAL HOME, INC.,

Respondents.

PETITION FOR REHEARING, AND SUGGESTION FOR
REHEARING IN BANC, ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the National Labor Relations Board respectfully petitions the Court for rehearing, and suggests rehearing in banc, with respect to the decision of a panel of the Court (Chief Judge Kaufman, Judges Anderson and Van Graafeiland) filed March 3, 1976, insofar as it denies enforcement of the provisions of the Board's order remedying an employer's unlawful requests for its employees' statements given to the Board during investigation of this case. As set forth in Chief Judge Kaufman's dissent, the panel's decision on this issue "runs counter both to firmly established Board precedent and to the decisions and reasoning of several circuits", including this Court (sl. op. p. 2276).

1. The undisputed facts in this case show that after the issuance of an unfair labor practice complaint, Company President Gleason asked each of his four employees for copies of affidavits they gave to Board agents in connection with an unfair labor practice charge that the Company had unlawfully locked out the employees and conditioned their return to work on resigning from their union. The employees willingly complied. The panel held that the employer requests, "not threatening in themselves" and made at a time when the employer was preparing for trial, were not violative of the Act (sl. op. pp. 2271-2272). We submit that this holding is contrary to settled law insofar as it (a) requires proof of coercive effect and (b) justifies, on the ground of trial preparation, and employer's blanket requests for Board affidavits from all his unit employees.

2. The panel's decision directly conflicts with the well-established rule that requests to employees for pretrial statements are inherently inhibitory without need for proof of an actual coercive effect. In a long line of decisions, the courts and the Board have held that an employer who questions employees broadly about the contents of their pretrial affidavits given to the Board or who requests that they obtain copies for the employer violates Section 8(a)(1) of the Act unless he specifically demonstrates a necessity for such information in preparation for trial.¹ See *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 133 (C.A. 5, 1964); *Retail Clerks International Ass'n v. N.L.R.B.*, 373 F.2d 655, 658 (C.A. D.C., 1967); *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F.2d 750, 753 (C.A. 6, 1967), cert. denied, 382 U.S. 830; *Bayliner Marine Corp.*, 214 NLRB No. 11 (1975), 87 LRRM 1450 and cases there cited. The rationale for the above decisions holding that requests for the pretrial statements of employees are in themselves

¹ No such specific showing was made here (see *Infra*, pp. 5-6).

coercive is set forth in the following language of the Board (143 NLRB 848, at 849-850), approved and quoted by the Sixth Circuit in *Winn-Dixie, supra*:

Pre-trial statements taken by the General Counsel are intended to record and preserve the facts leading to the alleged unfair labor practices on which the charge is based. As such, these statements necessarily reveal the employees' attitudes, activities, and sympathies in connection with the Union. Moreover, the statements divulge the union sympathies and activities of other employees and the conduct of the supervisors toward the Union and its adherents. As such, they should be as free of any inquisitive interest by the Employer as are the employees' union activities themselves. Knowledge by the employee that his Employer is manifesting an interest in what the employee may say about him can only exert an inhibitory effect on the employee's willingness to give a statement at all or to disclose all of the matters of which he has knowledge for fear of saying something that might incur the Employer's displeasure and possible reprisal. Accordingly, we are of the opinion that the Respondent's requests for copies of employees' statements to the General Counsel constitutes interference, restraint and coercion within the meaning of Section 8(a) (1) of the Act.

This Court's decisions are in accord. In *Henry I. Siegel Co., Inc. v. N.L.R.B.*, 328 F.2d 25, 27 (C.A. 2, 1964), this Court sustained the Board's finding that an employer's request of employees to produce copies of their statements given to a Board agent violated the Act because the employer's requests had "an inhibitory effect on the employees' exercise of their right to have an effective investigation by the Board of alleged unfair labor practices." 328 F.2d at 27. In *N.L.R.B. v. General Stencils, Inc.*, 438 F.2d 894, 898 (C.A. 2, 1971), there was no evidence that the single employee involved felt himself "subject to coercion — indeed, he apparently had no qualms in indicating . . . that

he told the Board 'the truth.' " This Court nevertheless stated (438 F.2d at 898):

We thus might have hesitated in sustaining the Board's finding on this issue were not that we perceive no legitimate employer interest in the solicitation of such information under the circumstances here presented and an order condemning such questioning without proof of effect is thus justified [footnote omitted].

As this Court recognized in *General Stencils, supra*, the test in determining whether conduct violates Section 8(a)(1) of the Act is not whether specific employees were in fact coerced but whether an employer's conduct has the tendency to coerce employees. See, e.g., *N.L.R.B. v. Syracuse Color Press, Inc.*, 209 F.2d 596, 598-599 (C.A. 2, 1954), cert. denied, 347 U.S. 966; *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 763 (C.A. 6, 1965); *Elastic Stop Nut Corp. v. N.L.R.B.*, 142 F.2d 371, 377 (C.A. 8, 1944), cert. denied, 323 U.S. 722; *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7, 1946). See also, *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) where the Supreme Court stated that the Board "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."

Thus, to the extent that the panel's decision herein requires evidence of actual coercion to sustain a violation, it is contrary to the decisions of this and other circuits. As Chief Judge Kaufman stated in his dissent (sl. op. p. 2275) (emphasis in the original):

The coercion and chilling effect we decried in *Siegel* inheres in the request itself. The employee cannot fail to be aware that a refusal to comply will be interpreted —

and remembered — as an admission that the statement contained matter that he did not wish his employer to see. See *Texas Industries v. N.L.R.B.*, 336 F.2d 128, 134 (C.A. 5, 1964). And, even if the solicited employee's compliance is purely voluntary, the knowledge that a request has been made will have a corrosive effect on the frankness of *other* employees.

3. Contrary to the panel majority's assumption (sl. op. p. 2272), the necessities of trial preparation do not justify blanket requests by employers to employees for their pretrial statements. Here, Gleason offered no such reason for his requests; rather, the facts show only that complaint had issued and that requests were made thereafter. In *General Stencils, supra*, this Court expressly reserved the question of whether proof of inhibitory effect was required where the employer made a justified claim of need for such statements in preparation for trial, while noting that the Sixth Circuit had twice rejected such employer claims and found that the employers' requests had "exceeded the necessities of the situation." 438 F.2d at 898, n. 3, citing *N.L.R.B. v. Winn-Dixie Stores, Inc., supra*, 341 F.2d at 752-753, and *Surprenant Mfg. Co. v. N.L.R.B., supra*, 341 F.2d at 762. On this record, Gleason's requests were similarly excessive. Indeed, there is no more evidence of necessity for trial preparation in this case than there was in *General Stencils, supra*, where this Court upheld the Board's finding of a violation. Gleason did not tell his employees he wanted their statements for trial preparation, and made no claim that he was acting at the behest of counsel. In short, Gleason failed to demonstrate any legitimate need for his employees' statements. Nor was there any attempt to restrict the information requested to that relevant to the allegations in the General Counsel's complaint. Clearly, requests to employees in these circumstances are not properly tailored to, and thus not justified by, the necessities of trial preparation. See, *Surprenant Mfg. Co. v. N.L.R.B., supra*, 341 F.2d at 770, and *General Stencils, supra*.

As Chief Judge Kaufman pointed out in his dissent, to require a particularized showing of necessity does not inhibit an employer in his trial preparation (sl. op. p. 2275). When the General Counsel calls an employee as a witness, the Board provides the employer, upon request, with a copy of the employee's statement. 29 C.F.R. § 102.118(b). See *Raser Tanning Co. v. N.L.R.B.*, 276 F.2d 80, 82-83 (C.A. 6, 1960), cert. denied, 363 U.S. 830. And, where circumstances warrant, the employer may obtain a continuance to meet surprise testimony. *Retail Clerks International Ass'n. v. N.L.R.B.*, *supra*, 373 F.2d at 658. Finally, the employer may interview his employees and question them within established safeguards before the hearing concerning matters relevant to the complaint. *Surprenant Mfg. Co. v. N.L.R.B.*, *supra*, 341 F.2d at 762. Such permissible questioning is much less violative of employee rights than is a blanket request for Board statements since the Board investigator must, if he is effectively to ascertain all possible violations and prepare a complaint, ask an employee questions concerning a wide range of union activities and individuals who may never be involved in the proceeding. The need to insure the confidentiality of employees' pretrial statements, coupled with their eventual availability at the hearing and the less drastic alternatives the employer has to obtain information needed in preparation for trial, justifies the Board's conclusion that Gleason's blanket requests to employees for their Board affidavits were violative of the Act.

4. Finally, the panel's reliance on *Robertshaw Controls Co., Lux Time Division v. N.L.R.B.*, 483 F.2d 762 (C.A. 4, 1973) is misplaced. In that case, five employees sought relief from the company after allegedly being harrassed by union organizers at a 550-employee plant. The company responded by reprimanding the union recruiters. The Board investigated the company's disciplining of employees for union activities and received statements from each of the five employees who had complained against the union activists. At the company's request, the five

complaining employees, who had originally looked to the company for protection, yielded copies of the statements they had given to the Board. These employees, whose complaints had precipitated the reprimand of the union organizers, obviously wished to help the company defend its action taken on their behalf. Thus, in the Court's view, no coercion was inherent in the company's requests for statements, since the five employees' interest in this issue was not adversary to that of the employer. For these reasons, the court stressed that it "reach[ed] the decision in this case upon its *particular* and somewhat *unusual* facts." 483 F.2d at 770 (emphasis added).

The panel's characterization of the facts here as appearing "fairly similar" (sl. op. p. 2270) to those in *Robertshaw* is erroneous. Although two of the four employees whose statements Gleason requested subsequently appeared as employer witnesses at the hearing, they were not allied in interest with Gleason at any time. Moreover, the remaining two employees appeared as witnesses on behalf of the General Counsel. Furthermore, in *Robertshaw* the employer's counsel was involved, thus indicating a genuine interest in trial preparation. In that case, counsel had prepared a talk and drafted a form letter to be presented to selected employees should they wish to assist their employer. Each employee was explicitly told that his employment "would not be adversely affected in any way" if he refused to cooperate and was further told he would not be "rewarded in any way" for his cooperation. 483 F.2d at 766 and n. 7. Here, on the contrary, Gleason's requests were made to all employees in the unit; the employees were not told that their statements were needed for trial preparation; and Gleason gave no assurances against reprisal and made no other attempt to minimize the coercive impact of the requests upon employees. As we have shown, this case is wholly unlike *Robertshaw* on the issue of inherent coercion as well as the justification of genuine necessity for

trial preparation. Paraphrasing Chief Judge Kaufman's dissent, to extend the *Robertshaw* rationale to cover the "strikingly different" factual setting of this case is to misapply the law and allow a gross interference with the employees' right to have effective Board investigation of alleged unfair labor practices.

CONCLUSION

For the reasons stated, the Board respectfully requests the Court to grant rehearing, and suggests rehearing in banc. After rehearing, the Court should modify its opinion and enter an order granting enforcement of that portion of the Board's order remedying Gleason's unlawful requests for employees' Board statements.

ROBERT A. GIANNASI,
Assistant General Counsel,
 JANET C. McCAA,
Attorney,
 National Labor Relations Board,
 Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
 JOHN E. HIGGINS, JR.,
Deputy General Counsel,
 ELLIOTT MOORE,
Deputy Associate General Counsel,
 National Labor Relations Board.

March 1976.

UNITED STATES COURT OF APPEALS

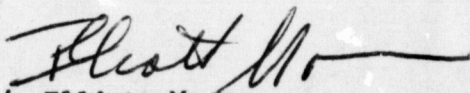
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)	
)	
Petitioner,)	
)	
v.)	No. 75-4018
)	
MARTIN A. GLEASON, INC. and)	
GUTTERMAN FUNERAL HOME, INC.,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed petition for rehearing, and suggestion for rehearing in banc in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Fellner & Rovins
Att: Alan D. Gallay and
Samuel D. Rosen, Esqs.
230 Park Avenue
New York, New York 10017


/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 24th day of March, 1976.